IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-231

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA AND THE COUNTY OF NASSAU, NEW YORK,
Petitioners,

v.

WILLIAM T. COLEMAN, JR., et al.,

and

BRITISH AIRWAYS, COMPAGNIE NATIONALE AIR FRANCE, AND PACIFIC LEGAL FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT PACIFIC LEGAL FOUNDATION IN OPPOSITION

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SUBJECT INDEX

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OPINIONS BELOW

The Decision of the Secretary of the Department of Transportation on the Concorde supersonic transport is unreported, but copies have been lodged separately with this Court. The Order of the United States Court of Appeals for the District of Columbia Circuit affirm-

ing the Decision of the Secretary of Transportation is also unreported, but is set forth in the Appendix to the Petition for Certiorari (Pet. App. 1a-4a).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the decision of the Secretary of Transportation to allow a limited trial period of flights of the Concorde supersonic transport into the United States prior to the promulgation of supersonic aircraft noise regulations was within the authority and discretion of the Secretary when such trial period is, *inter alia,* for the purpose of aiding in the promulgation of such regulations.

2. Whether the court of appeals below erred in choosing to believe the statement of the Secretary of Transportation that his decision to permit limited trial flights of the Concorde supersonic transport was based entirely upon the record before him, rather than believing the petitioners' allegations that such decision was influenced by other considerations not of record.

STATUTE INVOLVED

The provisions of Section 611 (49 U.S.C. § 1431) of the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972, are set forth in Pet. App. 5a-10a.

STATEMENT OF THE CASE

This case involves the ongoing attempt by the Board of Supervisors of Fairfax County, Virginia and the County of Nassau, New York to stop the Concorde supersonic transport aircraft (SST) from operating

in the United States for a test period of sixteen months. It involves an effort to stop the development of a new, first generation, technology which has shortened long-distance, trans-oceanic travel time by one-half and improved communications between nations. It involves an effort by petitioners to overturn an exemplary governmental decision which is a model of completeness and accuracy and which carefully balances all relevant factors—and which arrives at a conclusion extremely favorable to the public interest. And, this case involves an attempt by petitioners to deal a harsh blow to two traditional friends of the United States, the United Kingdom and the Republic of France, who have made a massive commitment of human, technological, economic, and other resources to the project which the petitioners would have this Court stop.

Simply put, Fairfax and Nassau Counties want to "stop Concorde" because they do not like it. The losing litigants do nothing more than advance a myopic construction of a statute, the relevance of which to this case is not demonstrated; and a question of fact that was not accepted by the court of appeals below.

The Concorde SST is the result of over a decade of cooperative effort by the governments and private industry of the United Kingdom and the Republic of France. These two nations committed thirteen years and $3 billion to the project. The result, the Concorde, is capable of carrying 100 passengers at a cruising speed of 1,300 miles per hour—twice the speed of sound. It is presently in limited commercial operation by British Airways and Air France on the Washington to London and Washington to Paris routes. It has reduced the flying time between those cities from seven to three and one-half hours. So far, the results demonstrate that it is a technological marvel; its chances for

commercial success are good; and it is environmentally sound. In short, all of the dire predictions made by Fairfax County and others below about the Concorde have failed to materialize. On the contrary: the Concorde works.

The decision to permit " . . . limited scheduled commercial flights into the United States for a trial period not to exceed 16 months under limitations and restrictions . . . "[1] (footnote omitted) was made by the Honorable William T. Coleman, Jr., Secretary of the Department of Transportation on February 4, 1976. That sixty-one page decision was made after meticulous evaluation of a record which included: a draft environmental impact statement (DEIS) (March 3, 1975) by the Federal Aviation Administration (FAA); a series of public comments on the DEIS; FAA's independent research on proposed Concorde operations; FAA's comprehensive final environmental impact statement (FEIS) (November 13, 1975); an unprecedented seven-hour public hearing conducted by the Secretary of Transportation personally on January 5, 1976, to consider public comments on the FEIS; numerous written submissions by the public following the Coleman hearing; and an Addendum to the FEIS.

After careful consideration of numerous public comments,[2] Secretary Coleman announced his favorable decision on February 4, 1976. Fairfax and Nassau Counties and others sought review of that decision in the United States Court of Appeals for the District of

[1] "The Secretary's Decision on Concorde Supersonic Transport" at 3 (Feb. 4, 1976) (hereinafter referred to as the "Secretary's Decision").

[2] Pacific Legal Foundation sponsored the oral and written testimony of four expert witnesses at the hearings before Secretary Coleman.

Columbia Circuit. Pacific Legal Foundation, as well as Air France, British Airways, and others, sought and were granted permission to intervene in all actions seeking review in the Court of Appeals. On May 19, 1976, that court affirmed the Secretary's Decision in an Order which appears at Pet. App. 1a-4a.

Apparently mindful of the folly of seeking review of the numerous other aspects of Secretary Coleman's Decision alleged to be illegal below, Fairfax and Nassau Counties now press but two claims, (a) that in reaching his conclusion the Secretary erred in permitting limited trial commercial flights of the Concorde SST into the United States in the absence of a final SST noise rule; and (b) the Secretary was untruthful in stating he had reached his decision only upon the materials of record. Neither of these two matters rises to a level of importance worthy of consideration by this Court.

Concurrently with the development of the record which led to Secretary Coleman's Decision, the Environmental Protection Agency (EPA) and the FAA were moving forward with a joint effort to promulgate a noise control rule in regard to supersonic transport aircraft as required by § 611 of the Federal Aviation Act of 1958, 49 U.S.C. § 1431, as amended by the Noise Control Act of 1972 (Pet. App. 5a-10a). The Environmental Protection Agency, as required by that statute,[3] proposed SST noise standards to FAA on

[3] Section 611 mandates a complex series of interagency maneuvers before promulgation of aircraft noise rules. Briefly summarized, the law requires EPA to propose a rule, but the FAA is given ultimate authority for review and promulgation of the rule after consultation with EPA. In the event of a disagreement between the agencies, further complex negotiations and studies are mandated.

February 27, 1975. The FAA published the proposal as a notice of proposed rule making on March 28, 1975. 40 Fed. Reg. 14093. It was then the subject of public hearings on May 16 and 22, 1975. Simultaneously, an environmental impact statement (EIS) under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (NEPA) was begun. All of these steps are mandated by § 611 which prescribes the time periods within which the FAA must commence to act *once EPA has initiated the process.* The statute also states that FAA shall act upon an EPA proposal "[w]ithin a reasonable time after the conclusion of [the public] hearing and after consultation with EPA . . . ." § 611(c)(1). Pet. App. 7a.

The EPA's 1975 proposal was pending before FAA at the time of Secretary Coleman's January 5, 1976, public hearing on the Concorde. Part of the Secretary's consideration at that hearing was whether he could legally allow the Concorde to land in the absence of a final SST noise rule.

The record of that hearing closed January 13, 1976. The next day, EPA submitted a *new,* substantially revised SST noise proposal to FAA. Thus the entire process began again—as § 611 requires. The FAA published the proposal within thirty days. 41 Fed. Reg. 6270, 6274-6275 (Feb. 12, 1976). Public hearings were held on April 5, 1976, within sixty days of publication of the proposal in the Federal Register. At present, a new EIS is being prepared.

There is presently pending in the United States District Court for the District of Columbia an action brought by petitioner Fairfax County to compel the Administrator of FAA to adopt supersonic aircraft

noise control regulations. *Board of Supervisors of Fairfax County, Virginia, et al.* v. *McLucas,* Civil No. 76-0139 (D. D.C.). Petitioner Fairfax has there moved for summary judgment.

ARGUMENT

By no stretch of the imagination can petitioners be deemed to have met the criteria suggested in Rule 19 (1)(b) of this Court for the granting of writ of certiorari. They have pointed to no conflict between the courts below,[4] or between the order below and applicable decisions of this Court,[5] or any important federal question.[6] Nor have they demonstrated that the agency and court below departed from the accepted and usual course of judicial proceedings. On the contrary, the remedy sought—remand to a United States District Court for the finding of facts from which may be concluded the veracity of the Secretary of Transportation —would be an extreme departure from the usual deference accorded members of the Cabinet and would, indeed, constitute no more than a sniping at his personal integrity.

Concerning the noise control rule argument, petitioners' attempt to concoct an important question of federal law is fatally weak. This case goes no further than petitioners' unique desire to stop one particular type of aircraft from using certain airports in the

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[4] *National Cable Television Ass'n* v. *U.S.,* 415 U.S. 336, 340 (1974).

[5] *Teleprompter Corp.* v. *CBS,* 415 U.S. 394, 407-408 (1974).

[6] *Id.* at 399.

United States. It is but episodic.[7] They offer no federal law the Secretary may be said to have transgressed. Rather, petitioners merely allege that he has "take[n] immoral advantage" of the lack of a supersonic noise control regulation. Pet. 7-8. The Secretary's morality was not heretofore in issue and the Supreme Court of the United States is an inappropriate forum in which to seek to find arbiters thereof.

Petitioners would also have this Court review certain documentary matters (contained in Pet. App. 17a-34a) which they attempted to offer to the court of appeals below. In so doing, they merely ask this Court to review facts considered and rejected below by the court of appeals. Such an effort is hardly worthy of the attention of a Court which, in the past, has stated:

> We do not grant a certiorari to review evidence and discuss specific facts. *United States* v. *Johnson,* 268 U.S. 220, 227 (1925).

I.

The Secretary's Decision To Allow a Trial Period of Commercial Supersonic Transport Flights Into the United States in Order To Aid in Promulgation of an SST Noise Regulation Was Within His Authority and Discretion.

The thrust of petitioners' first argument is that promulgation of an SST noise rule under § 611 of the Federal Aviation Act was a legal condition precedent to landings of the Concorde SST in the United States. For various reasons, their legal analyses are in error and their factual premises are lacking in crucial detail.

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[7] "Special and important reasons" which may justify the grant of a writ of certiorari imply a reach to a problem beyond the academic or episodic—*Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74 (1955).

The assertion that ". . . the FAA has adamantly refused to develop supersonic noise standards" (Pet. 7) could not be further from the truth. As the history of the proposed SST noise rule reveals, the FAA has acted diligently and in good faith in formulating such a regulation.

As for why an SST noise rule was not promulgated eight and one-half years ago as Fairfax and Nassau Counties apparently claim it should have been (Pet. 7), Secretary Coleman spoke of this in his Decision:

> . . . the decision not to act precipitously on supersonic aircraft should not be surprising in light of the history of the development of the supersonic transport. During the early developmental stages of this type of aircraft, both in the United States and Europe, the technological capacity to minimize the noise levels generated by an engine sufficiently powerful to drive a supersonic transport was uncertain. *Promulgation of a feasible noise rule at that time would therefore have been highly speculative.* By the time scientists had gained a sense of the limits on the ability to control supersonic aircraft noise levels, the design of the Concorde was fixed and, for all practical purposes immutable. (Emphasis added) (footnote omitted)
>
> Secretary's Decision at 15-16.

The Secretary's ultimate conclusion on this issue, made after reviewing the record and the submissions of numerous legal memoranda to him by the public, was:

> I must therefore conclude that the absence of a noise rule promulgated under the Federal Aviation Act does not compel a decision either way on whether the Concorde should be permitted to land.
>
> Secretary's Decision at 17.

This conclusion was concurred in by the Environmental Defense Fund[8] and the Environmental Protection Agency. In a subsequently submitted affidavit, the Honorable Russell Train, EPA Administrator, stated that the decision of when to issue a generally applicable SST noise rule is totally independent of the narrow question of whether to allow limited, demonstration flights of Concorde:

> It was EPA's intention that the Secretary of Transportation take into consideration its January 13, 1976, proposal in reaching his decision on February 4, 1976, concerning the British Airways and Air France applications for Concorde service into the U.S. *EPA did not intend to cause the Secretary to postpone his decision, nor did EPA intend to preempt the Secretary's authority to make a decision on the specific issue before him,* which was whether to direct the FAA to amend the operations specifications of the two foreign air carriers to allow up to six daily flights of the Concorde into two U.S. airports, John F. Kennedy International (JFK) and International Airport at Dulles (IAD), under certain restrictions, and subject to any subsequently-adopted, applicable regulations.
>
> It was EPA's intention that the FAA in accordance with the requirements of 49 U.S.C. 1431, proceed as expeditiously as possible to consider and promulgate a final rule regarding supersonic aircraft noise.[9] (Emphasis added).

[8] "We believe that this fact [the absence of an SST noise rule] is without significance to your present decision." Final Submission of the Environmental Defense Fund on the Concorde SST.

[9] Exhibit A to Memorandum of Defendants in Opposition to Plaintiffs' Motion for Preliminary Injunction, dated February 20, 1976, in *Board of Supervisors of Fairfax County, Virginia, et al.* v. *McLucas*, Civil No. 76-0139 (D. D.C.)

Thus, the two agencies, EPA and DOT[10] charged with promulgation of the noise control rule were in complete accord on the legal issue: It was within the Secretary's discretion to make the decision he did, allowing the Concorde to land at Dulles and John F. Kennedy International Airports for a limited period of time and under stringent conditions irrespective of the existence of a supersonic noise control rule. Traditionally, this Court, when confronted with a statutory construction question, "shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Further, it is unnecessary to find that the agency's "construction is the only reasonable one, or even that it is the result [the Court] would have reached . . . in the first instance . . . ." *Id.* Almost presciently this Court, in *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961), stated:

> We see no reason why we should not accord to the [Atomic Energy] Commission's interpretation of its own regulation and governing statute that respect which is customarily given to practical administrative construction of a disputed provision. Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933).
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> *Id.* at 408 (cited in *Udall* v. *Tallman, supra,* 380 U.S. at 16).

[10] The FAA is an agency within the Department of Transportation. 49 U.S.C. §§ 1655(c), 1657.

Nor does Secretary Coleman's decision contravene the remarks of Senator Tunney which petitioners offer (Pet. 8) as the definitive statement on the legislative history of this law.[11] The Senator stated that he expected a final SST noise rule to be promulgated "... before such aircraft are in commercial service." 118 Cong. Rec. 18645 (1972). No *final* decision on allowing the Concorde to engage in commercial service in the United States has been made. Coleman's February 4, 1976, Decision permits only a sixteen-month *demonstration* period. Secretary's Decision at 3. The final decision to permit commercial flights may be years away: the sixteen-month period must elapse and the Secretary has announced that an EIS must be prepared and considered before his final decision is issued. Thus, the Secretary's non-final decision must be deemed in compliance with Senator Tunney's remarks.

Furthermore, the Secretary's decision to allow trial flights of Concorde was intended to aid in promulgation of an SST noise rule. Coleman noted in his Decision that:

> The unique characteristics of Concorde noise and the publicity that has surrounded its advent may well aggravate the community's response to this source of noise. *This subjective characteristic of noise* response may best be evaluated through a controlled demonstration period of sufficient length to enable an assessment, after the initial publicity has subsided, of community reaction to Concorde noise. A demonstration will also enable additional testing at various measuring points to supplement the data contained in the EIS. The information from this demonstration will enable us to determine whether these original Concordes should be permitted to operate into designated United States airports in accordance with specified operating procedures and restrictions. *It will also provide useful information in the review and evaluation of the EPA's latest proposal for an SST noise standard,* although consideration of that standard will not be delayed until the completion of this demonstration but will proceed with deliberate speed. (Emphasis added).
>
> Secretary's Decision at 58.

[11] A closer reading of the history of the Noise Control Act indicates that Senator Tunney's remarks were an apparent attempt to make law via "legislative history" shortly after the substance of his comment had been rejected by the House of Representatives as an amendment to the Noise Control Act. 118 Cong. Rec. 644-645 (1972) (Remarks of Sen. Tunney).

His decision to allow an extremely limited number of flights for a relatively short time was entirely reasonable since it will actually foster thorough compliance with § 611. It was not at all immoral.

Finally, the petitioners' comment that they "are without redress" in regard to the absence of an SST noise rule is fallacious. As noted, they are presently actively pursuing a mandamus action to compel the FAA to promulgate an SST noise rule.[12]

II.

The Secretary's Decision Was Made Solely on the Basis of the Record.

Petitioners' insinuations that the Secretary's Decision "was prompted by factors outside the record and was made principally by governmental officials other

[12] *Board of Supervisors of Fairfax County, Virginia, et al.* v. *McLucas,* Civil No. 76-0139 (D. D.C.).

than the Secretary" (Pet. 10) are nothing more than idle speculation and gossip. In the Decision which he personally signed, Secretary Coleman states:

> Today's decision is based entirely on my review of the EIS, on the January 5 hearing, and on my subsequent review of the transcript and other written materials submitted for the record. At the public hearings, the United Kingdom's Minister of State for the Department of Industry and France's Director of Air Transport Civil Aviation Department, each testified that there was no expressed or implied commitment that the United States was obliged to permit the Concorde to land in the United States, and no one has brought to my attention any such expressed or implied agreement.
>
> Secretary's Decision at 2.

At oral argument in the court of appeals, counsel for the Department of Transportation responded to Nassau County's last minute attempt to introduce the documents (Pet. App. 17a-34a) which allegedly show "outside influence" on the Concorde decision:

> Mr. Catterson [counsel for Nassau County] comes in, in the final few minutes of the argument, and attempts to cash in on a sort of fear that we all have, and it's understandable since Watergate, that the whole thing is a fraud; that Secretary Coleman, when he said in his opinion that he had only seen things on the public record—and he says that explicitly—must have been lying: Do not believe him.
>
> Well, if it takes an affidavit from Secretary Coleman, we will supply the affidavit from Secretary Coleman, and he will swear that he is not lying.
>
> (Partial Tr. 7)

Petitioners' contentions here are of the same nature: they ask this Court to disbelieve Secretary Coleman's signed statement and urge "remission to the District Court [13] for development of a full record, or in the alternative, a plenary inquiry into the underlying facts." Petitioners' assertions are unsubstantiated, Secretary Coleman's statement is entitled to substantial credence, and petitioners' claims to the contrary simply do not rise to the level of significance required to merit the attention of this Court.[14]

Further, petitioners' assertion that these documents were not before the court of appeals is in error. They appeared as appendices in several of the petitioners' reply briefs below. Counsel for the Department of Transportation indicated at oral argument in the court of appeals that he had no objection to the court's reading them, and in fact, asked the court to take them into account. (Partial Tr. 7). He argued that these "docu-

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[13] It should be noted that the "court of first impression" in this case was the agency itself (DOT) and that direct review of the Secretary's Decision was properly brought in the court of appeals. Petitioners initially sought review of the Secretary's Decision in a district court which dismissed their case for lack of jurisdiction, indicating that petitioners should have sought direct review of the Secretary's Order in a court of appeals. *Board of Supervisors of Fairfax County, Virginia, et al.* v. *McLucas*, Civil No. 76-0139, (D. D.C.), Order of March 12, 1976. Thus petitioners' request here for "remission to the District Court" is meaningless since the question of the legality of the Secretary's Decision was never properly before a district court. Therefore, petitioners' reliance upon *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), is misplaced as that case was properly brought in federal district court. *Id.* at 406 n.7.

[14] We are unable to perceive how the issue of the credibility of the Secretary of Transportation fits into or meets any of the criteria listed in this Court's Rule 19 which requires more than insinuations as a basis for granting the writ.

ments are of historical interest only." (Partial Tr. 10). Fortunately, this last minute frantic effort by Fairfax and Nassau Counties to use the documents to prove the existence of a "deal" came to nothing: the court of appeals apparently chose to consider those documents as the historical but wholly irrelevant documents they are. In doing so, that court committed no error.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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